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IN THE

Supreme Court of the United States

October Term, 1968

No. 758

NATIONAL LABOR RELATIONS BOARD,

against

JOHN LANGENBACHER CO., INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	3
Statement	3
(a) The Board's Finding of Facts	3
(b) The Decision of the Court	7
Reasons for Granting the Writ	8
Conclusion	14
Appendix A	
Opinion of United States Court of Appeals for the Second Circuit	15
Judgment	22
Appendix B	
Decision and Order	24
Trial Examiner's Decision	25
Appendix C	
Revelant Provisions of the National Labor Relations Act	48

Cases Cited

	PAGE
Auto Workers v. Wisconsin Board, 336 U. S. 245 ...	9
Labor Board v. Rockaway News Co., 345 U. S. 71 ..	8, 11
Labor Board v. Sands, 306 U. S. 332	8
N. L. R. B. v. Furriers Joint Council, 224 F. 2d 78 ..	9
N. L. R. B. v. Interboro Contractors, Inc., 388 F. 2d 495	12

Statute Cited

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq.):

Section 7 .....7, 14, 48

Section 8 (a) (1) 6, 8, 48

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John Langenbacher Co., Inc., petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit entered in this case on July 17, 1968.

Opinion Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 15-23) is reported at —— F. 2d ——. The findings of fact, conclusions of law and order, of the National Labor Relations Board (App. B, *infra*, pp. 24-47)) are reported at 161 NLRB 258.

Jurisdiction

The judgment of the Court of Appeals was entered on August 22, 1968 (App. A, *infra*, pp. 15-23). The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

On June 19, 1965, petitioner's president requested five of the employees working in petitioner's woodfinishing shop to come to his office for the purpose of finding out if they would work two shifts, one starting at 8:00 A. M. and ending at 4:30 P. M. and the other starting at 12:30 Noon and ending at 9:00 P. M. The employees refused to work two shifts. The employees say they refused to work two shifts because petitioner's president insisted that they work both shifts at regular pay. The employees said they would work only if they received extra pay. Petitioner denies that the subject of pay was discussed. As the last employee left the president's office at the end of the meeting he claims he overheard the president say he would get even with them.

The collective bargaining agreement between petitioner and the union covering the employees in petitioner's woodfinishing shop provides:

> "*Section (6).* The work week shall consist of forty (40) hours per week divided into five (5) work days from Monday to Friday inclusive. Eight (8) hours shall constitute the working day. Double time shall be paid for all work performed outside the hours specified. Each employee shall have one hour for lunch, which may be reduced to one half hour on mutual consent."
>
> *Section (24).* ' . . . During the life of this agreement and pending the adjustment of any disputes by either the Joint Adjustment Board or by the American Arbitration Association, there shall be no sit-downs, slow-downs, work stoppages or lockouts by either the union or the employer, except in case of the failure by either of the parties to abide by such award in arbitration as aforementioned.' "

The question presented is: Was the employees refusal to work two shifts unless they received premium pay a violation of the collective bargaining agreement and was such refusal protected concerted activity under Section 7 of the National Labor Relations Act as found by the Board and the Court of Appeals.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), are set forth in Appendix C, *infra*, p. 48.

Statement

(a) The Board's Finding of Facts.

Petitioner is engaged in the manufacturing and distribution of architectural woodwork and employs approximately one-hundred employees. Of these employees 8 to 10 worked in petitioner's woodfinishing shop. These employees were members of District Council No. 9 of the Brotherhood of Painters and Decorators of American, A.F.L.-C.I.O. herein called the Union.

Petitioner maintained amicable contractual relations with the Union since 1935. Prior to July 31, 1964, petitioner executed individual collective bargaining agreements with the Union. The last such individual agreement terminated July 31, 1964. On July 1, 1964, petitioner joined the Manufacturing Woodworkers Association of Greater New York, Inc. which is a group of employers engaged in the same business and which acts as the collective bargaining representative for said employers. The Manufacturing Woodworkers Association of Greater New York, Inc. negotiated a collective bargaining agreement

with the Union covering woodfinishers employed by its members effective July 1, 1964. Effective August 1, 1964, upon the expiration of its individual agreement petitioner began to apply the terms of the Association's collective bargaining agreement. An addendum to said agreement was negotiated with the Union to cover petitioner. One of the purposes of the main agreement and the addendum was to move toward equalization of rates of pay in the industry.

In June, 1965, petitioner was working on a contract for the interiors for over thirty branches of the Chase Manhattan Bank. Because of delay in construction, petitioner's end of the job could not be installed at the job sites and as a result the finished material piled up at the plant. The finishing room was used for storage after petitioner's warehouse and truck dock had been filled. It thus became difficult for a full shift of finishers to properly function in the crowded quarters.

On Saturday, June 19, 1965, petitioner's foreman asked the woodfinishers if they would work two shifts, one starting at 8:00 A. M. and finishing at 4:30 P. M. and the other starting at 12:30 P. M. and finishing at 9:00 P. M. When the men refused the foreman's suggestion, they were requested by petitioner's president Tolksdorf to come to his office. After some discussion of their past services with petitioner, Tolksdorf told the men that they could repay him by working the two shifts at straight pay. (Tolksdorf denies that the rate of pay was mentioned.) The finishers refused to work two shifts and the matter was dropped. As the last finisher left Tolksdorf's office he claims he heard Tolksdorf say he would get even.

The Trial Examiner found that the employees were engaged in protected concerted activity during the course of their joint refusal to work two shifts.

On August 12, 1965, respondent terminated the jobs of five woodfinishers including Blum, and LiCausi. On August 14, 1965, the job of Infranca was terminated. These job terminations were conceded to be economically motivated.

Subsequently, employees Kohnken, Gruenstrass and Lucia were recalled to work. LiCausi, Blum and Infranca had attended the meeting in the office of petitioner's president on June 19, 1965, at which the woodfinishers refused the work of the two shifts.

A few days prior to August 18, 1965, a foreman in another shop engaged in the same work as petitioner called petitioner's foreman and asked him if he could refer some finishers to him. After some further conversation between the foreman, petitioner's foreman asked LiCausi, Infranca and Blum to meet him at a luncheonette near petitioner's factory on August 18, 1965. Petitioner's foreman advised them that work was available at another plant. Blum asked if the termination of their employment was permanent. Petitioner's foreman is alleged to have said the decision to lay them off was not his; he was merely following orders. Further, that he had warned Blum of the consequences of continued "union activity". Infranca and LiCausi said that petitioner's foreman told them they had no business getting involved in "union activity". (Petitioner's foreman denies he said anything about union activity.) Infranca and LiCausi accepted the job in the other plant. Blum had to have an operation on his finger which caused him to be disabled until in or about October and declined the job. It is undisputed that at the time petitioner's foreman had these conversations he was not acting in the course of his employment, it was no part of his job to find these former employees jobs. His conversation with the three employees took place off the petitioner's premises.

Subsequently, the three employees requested reemployment by petitioner.

The Board found petitioner violated Section 8 (a) (1) of the Act, by its refusal to re-employ LiCausi, Infranca and Blum, based upon the admissions of petitioner's foreman made in the luncheonette.

The alleged admissions of petitioner's foreman mentions only union activity without being specific. Nowhere in the Trial Examiner's findings (which were adopted by the Board) is mention made of what "union activity" motivated respondent's refusal to recall these employees.

The only so-called union activities in the Trial Examiner's decision are as follows: In or about August, 1964, some woodfinishers made inquiries at their union office as to when they would receive a wage increase which was negotiated effective August 1, 1964. Also mentioned is a visit by a group of petitioners' woodfinishers to the union's insurance office presumably in or about April, 1965 to make inquiries concerning contributions to the insurance fund. Petitioner was in full compliance with the collective bargaining agreement and there is no finding that petitioner had any knowledge of either of these incidents.

The Trial Examiner's report mentions the incident concerning two shifts on June 19, 1965 discussed herein.

The Trial Examiner's repo[illegible] mentioned a lawsuit brought by certain woodfinishers and a painter against the officials of the union. A petition to commence this suit was filed with the United States District Court on July 15, 1965, and denied. A subsequent petition was filed and granted according to the Trial Examiner on August 23, 1965 but the order is dated September 4, 1960.

The Trial Examiner bases his finding that LiCausi, Infranca and Blum were refused to recall upon alleged

admission made by petitioner's foreman at a meeting with them in the luncheonette on August 18, 1965, the purpose of which was to advise them of job opportunities in another shop. This meeting was the result of contacting these persons prior to August 18, 1965.

If the Trial Examiner's assumptions are correct, then the decision not to recall must have been made prior to the meeting in the luncheonette August 18, 1965. The lawsuit which was not commenced until subsequent to August 18, 1965, and obviously could not have affected the decision not to recall.

In any case there is no finding that petition had knowledge of this lawsuit prior to sometime late in September, 1965.

Other than these incidents there are no so-called union activities mentioned in the Trial Examiner's report subsequent to the Spring of 1963.

The Board adopted the findings and recommendations of the Trial Examiner and ordered petitioner to offer to Blum, LiCausi and Infranca full reinstatement in their former or substantially equivalent positions and to make each of them whole for any loss suffered by reason of failure to re-employ them.

(b) The Decision of the Court

The Court granted enforcement of the Board's action finding that petitioner had violated Section 8 (a) (1) of the Act by failing to re-employ LiCausi, Infranca and Blum because of their having engaged in concerted activity protected by Section 7 of the Act.

The only incident of so-called union activities mentioned by the Court below in its decision was the June 19, 1965 incident concerning the two shifts. It is apparent that the

Court below in upholding the Board finding that petitioner violated Section 8 (a) (1) of the Act relies upon the June 19, 1965 meeting and the threat alleged to have been made at that meeting.

Reasons for Granting the Writ

Both the Board and the Court of Appeals found the employer violated Section 8 (a) (1) of the Act by refusing to re-employ LiCausi, Infranca and Blum. In finding such violation the Board and Court found said employees were not re-employed because of their participation in protected concerted activity; namely, their refusal to work two shifts on June 19, 1965 as requested by their employer unless they received premium pay.

The collective bargaining agreement under which petitioner was working on June 19, 1965 did not prohibit two shifts nor did it require premium pay where two shifts were worked. The refusal of the employees to work two shifts unless they were paid premium pay constituted a violation of the provisions of said agreement herein set forth which provided that during the life of the agreement, pending adjustment of any dispute there would be no sit-down, slow-down, work stoppage or lock-outs.

In *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71, this Court held the refusal to cross a picket line violated the clause in a collective bargaining agreement prohibiting strikes, lockouts, or other cessation of work or interference therewith and was not protected activity within the meaning of Section 7 of the Act.

In *Labor Board* v. *Sands*, 306 U. S. 332, this Court held that a strike to compel the employer to apply seniority contrary to the provisions of an agreement was not protected concerted activity.

In *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 258, this Court said "because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert".

The Court of Appeals said that violation of a collective bargaining agreement is not protected concerted activity.

In *N. L. R. B.* v. *Furriers Joint Council, etc.*, 224 F. 2d 78, (2 Cir. 1955) the Court said (p. 80.): "When the union policy of spreading employment in the industry by imposing restrictions on overtime work attained valid contractual status, employees lawfully bound by the contract were not free to violate the agreement under the guise of engaging in concerted activities for their mutual aid or protection or of refraining from doing so, within the meaning of Section 7. . . . The Board's interpretation would have the effect of furnishing statutory protection to employees who chose to violate valid provisions of labor-management contracts. This we think is not consistent with the underlying purport of the act to promote the consummation of collective bargaining agreements as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strikes."

For the purpose of avoiding the application of the decisions of this Court as well as its own the Court of Appeals resorted to the following reasoning. It stated ". . . it is unclear whether respondent was contractually bound to provide a premium rate for split shift work" (two shifts are erroneously referred to as a split shift).

The explanation of this statement contained in a footnote states (App. A, p. 19): "Until July 31, 1964, Langenbacher executed individual collective bargaining agreements with the Union adapting the so-called Trade Agreement; the contract between the Union and the painting industry. On July 1, 1964, respondent (Langenbacher)

joined the Manufacturing Woodworkers Association of Greater New York, Inc., and effective August 1, 1964, began to apply the terms of the collective bargaining agreement of that Association". (This was the result of negotiation with the Union and an addendum to said agreement.)

The Court continues: "In June or July, 1965, several hardwood finishers from the New York area, including Blum, Infranca and LiCausi from the Langenbacher shop sought permission from the District Court to sue the officers of the Union for breach of their fiduciary duties as union officers. *This petition followed several incidents in which employers did not comply with the terms of the collective bargaining agreement and the Union did not act diligently or forcefully enough in the eyes of these men to protect employees' interests.*" (Italics added.)

The italicized portion of this statement is utterly and completely without truth and wholly unsupported by findings of fact or evidence. There is not a single instance in the entire record in this case of petitioner's failure to comply with the terms of the collective bargaining agreement.

The Court continues: ". . . one of the questions to be determined by the District Court for the Southern District of New York in the aforementioned suit is whether the Association agreement should be applied *inter alia* to the men in the Langenbacher shop, or whether that agreement has no validity and *the terms of the older Trade Agreement were applicable during the time involved here.*" (Italics added.)

Petitioner was not a party to the District Court action. The Court omits any explanation as to how an agreement between petitioner and the Union could be declared null and void when petitioner was not a party to the action. In any case at the time the incident herein involved occurred (June 19, 1965) there was not even a lawsuit pend-

ing. *Rockaway News Co., supra,* involved a similar situation. The refusal of the employee in that case to cross the picket line was a violation of the no-strike clause contained in a negotiated collective bargaining agreement. The agreement contained a union security clause for which approval had not been obtained as required by the Act. For this reason the Board held that the Agreement even though it was in effect at the time the refusal to cross the picket line occurred was utterly null and void and denied it any effect. To this the Court said: "It is one thing for the Board to say that the parties should not go under such a contract; it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct and which no authority had yet held void". (345 U. S. p. 77.)

The Court of Appeals found that the refusal of the employees to work two shifts unless they received premium pay did not constitute a contract violation. In so finding the Court threw out the collective bargaining agreement negotiated by petitioner and the Union and applied the terms of the Trade Agreement to which petitioner was never a party. The Trade Agreement was an agreement negotiated by the Union and the Master Painters Association. Petitioner was never a party to this agreement. This Court said in *Rockaway News Co., supra.* "There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained."

That the Court of Appeals in finding no contract violation was applying the terms of some other agreement is apparent from the following. The Court said that the refusal of the employees to work shifts having different starting times unless they received premium pay was an attempt to enforce their understanding of the collective

bargaining agreement and hence was protected activity. The applicable provisions of the collective bargaining agreement are set forth herein. In the absence of reading into the collective bargaining agreement language which is not there, it is impossible for any reasonable person to say that the said agreement required payment of premium pay for shifts starting at different times. The collective bargaining agreement is clear and unequivocal. No question of the interpretation of the collective bargaining agreement is involved. In refusing to work unless they received premium pay the employees were not interpreting the collective bargaining agreement but rather insisting upon applying terms of a completely separate and distinct agreement (The Trade Agreement). *N. L. R. B.* v. *Interboro Contractors, Inc.*, 388 F. 2d 495, 500 and 7 (2 Cir. 1967) to which the Court refers to support this proposition actually involved the interpretation of the collective bargaining agreement under which the employees were actually working.

The decision of the Court of Appeals seems to stand for the proposition that a group of employees who institute a law suit against the Union officials for breach of their fiduciary duty are no longer bound by their collective bargaining agreement. Success of such law suit is not made a condition. Such a proposition would destroy the prime purpose of the collective bargaining agreement to stabilize industrial relations and in this case would have to be applied retroactively. On June 18, 1965, no lawsuit against the union officials was then in existence.

The Court of Appeals said: "Even assuming, which we do not, that a Union's asking for benefits plainly not awarded by the collective bargaining agreement would collectively constitute a defense to subsequent employer misconduct, we hold that there is substantial evidence on the whole record to support the Trial Examiner's (and the Board's) conclusion."

Analysis of this statement will demonstrate its complete lack of substance. *First*, no union in this case requested benefits plainly not accorded by the collective bargaining agreement. Rather a small group of employees without consulting their Union demanded benefits not provided by the collective bargaining agreement and threatened a refusal to work if they were not provided. They were not the recognized bargaining representative and in any case had no right to make demands. *Secondly*, it is not the asking of benefits which is objectionable, but rather the refusal to work. Even if the union had the right to negotiate premium pay where more than one shift was worked, no employee was justified in refusing to work in violation of the agreement. For such refusal to work under the clear authority of this Court, the employees could have been discharged. Such discharge does not involve subsequent employer misconduct.

The Court continues: ". . . there is substantial evidence on the whole record to support the Trial Examiner's (and the Board's) conclusion."

The Trial Examiner and the Court of Appeals rely heavily upon the alleged admission of Comi, petitioner's foreman in the luncheonette on August 18, 1965, to establish refusal to re-employ because of union activity. Refusal to re-employ because of union activity does not in and of itself establish a violation. Such activity must fall within the area of protected activity. No one heard the so-called admissions except the three individuals who are claiming that they have been victims of discrimination for union activity. The Court says: "Comi was a supervisor under the act, and any admission he might have made in carrying out delegated duties were the respondent's admission." It is undisputed that at the time of said alleged admissions, Comi was not engaged in carrying out any delegated duty. He was engaged in a purely personal mission, to assist the three men in obtaining a job at

another shop if they wanted to work and to assist the foreman of that shop in obtaining workmen.

This activity did not take place in petitioner's premises. Comi, as an individual not as petitioner's foreman, called the three persons to the luncheonette to tell them about the jobs. What he did in the luncheonette was in no way related to petitioner's business. The doctrine applied by the Court that the admission of an agent acting within the scope of his authority are binding upon the principal has no application. It is petitioner's position that these alleged admissions were hearsay and could not be the basis for a finding of fact.

Comi is alleged to have told the three persons that they would not be re-hired by petitioner, at least immediately, because of their involvement in "union activity". The only words he used were "union activity". There is no explanation of "union activity". On August 18, 1965, the June 19th incident involving the two shifts was the only union activity concerning which petitioner had knowledge. This union activity clearly involved a violation of the collective bargaining agreement and was not protected concerted activity.

Conclusion

The decisions of the Board and the Circuit Court, that the employees refusal to work two shifts unless they received premium pay was concerted activity protected under Section 7 of the National Labor Relations Act, is under all of the circumstances contrary to the decision of this Court. It is respectfully submitted that the petition for writ of certiorari should be granted.

MILLER AND BUSH,

By: IRVING T. BUSH
Attorneys for Petitioner.

November 20, 1968.

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

WATERMAN, *Circuit Judge*:

The National Labor Relations Board, having decided that respondent had violated Section 8(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U. S. C. §158(a)(1), has petitioned this court, pursuant to 29 U. S. C. §160(e), for enforcement of its order requiring respondent to cease and desist from committing an unfair labor practice, to offer immediate and full reinstatement to three of respondent's employees, Blum, LiCausi, and Infranca, to reimburse these employees for whatever loss they may have suffered because of the violation, and to post appropriate notices. The Board's Decision and Order, consisting of an adoption of the findings, conclusions and recommended order of the Trial Examiner, is reported at 161 N. L. R. B. 258 (1966). Because we find this decision and order to be supported by substantial evidence, we grant the petition for enforcement.

The important facts found by the Trial Examiner may be stated briefly. Respondent's business involves the building and installing of wood interiors of banks, hotels, and similar business; among its employees is a group of men working as "hardwood finishers" who are represented by District Council No. 9, Brotherhood of Painters, Decorators, and Paperhangers of America (the "Union"). On June 19, 1965, respondent, through its foreman, Comi, called together the hardwood finishers and asked them to work a "split shift"; half of the crew would work from 8:00 A.M. to 4:30 P.M., the usual hours of work for these employees, and the other half would work from 12:30 P.M. to 9:00 P.M. This request was occasioned by respondent's

need to use its finishing room for storage, which made it difficult for a full shift of finishers to work efficiently there. Respondent feared it might not meet its contractual commitments and planned to alleviate the congestion by having fewer men than usual working at any one time. Under this split-shift proposal the pay of all the finishers would continue to be at the straight-time rate. The men, especially Blum, felt that those who worked the late shift might be entitled to a rate of pay greater than straight-time and felt that the Union ought first to be consulted. Comi told them to discuss the matter with the company president, Tolksdorf. Thereupon a group of the finishers, including Blum, Infranca and LiCausi, had a brief unpleasant meeting with Tolksdorf during which they refused to work a split shift this time because Tolksdorf was unwilling to promise that they would not have to work a split shift at straight time again in the future. As the meeting broke up, Tolksdorf, cursing, stated, "You —— me this time, I'll —— you the next time." Shortly thereafter, on July 2 or 3, 1965, Comi laid off Blum. When Blum called a week later to see if work had become available, Comi stated: "I told you Carl, if you are ever to get further involved in union affairs and those people upstairs hear about it, they will drop you immediately." Despite this statement, Blum returned to work. Again, about August 12, 1965, Comi, for economic reasons, laid off six employees, including Blum, LiCausi, and Infranca. The three other employees then laid off each had less seniority with respondent than the three named, but were recalled to work by Comi soon after the six-man layoff, while Blum, LiCausi, and Infranca were never recalled. However, during the layoff, Comi received a call from the finishing foreman at another company, William Somerville, Inc., in the course of which Comi was requested to

refer some good finishers to him. Comi suggested Blum, Infranca and LiCausi, but did not mention the other three men who had been laid off at the same time. The Somerville foreman indicated astonishment that these three men were available and Comi said he would "discuss this with you later." On August 18, 1965, Blum, Infranca and LiCausi met by prearrangement with Comi at a luncheonette and Comi told them of the Somerville jobs. He further told them that the decision to lay them off at Langenbacher was not his decision and that he was merely following orders. He told Blum that he had warned him before about union activities, and, as to the other two, he said he was surprised that they had become involved in "union affairs," and that if they "kept their noses clean" and apologized to Tolksdorf they might be rehired in a few months. In response to Blum's inquiry whether this meant the layoff was permanent, Comi replied that they would have to "read between the lines"; and if they came back "looking for work and saw new faces with work available," but Comi would not rehire them, they would know the answer. Subsequent to the August 18, 1965 meeting these three men informed respondent on several occasions of their desire to return to work but were told that there was no work for them. As well as recalling the other three laid-off employees, the respondent also hired new employees after these requests were made. Respondent explained this fact by stating that the particular skills possessed by Blum, Infranca and LiCausi had not been needed.

The Trial Examiner (and the Board) concluded on the basis of the foregoing facts that: Tolksdorf's promise of future action against the employees for refusing to work the split shift was a threat of reprisal violating 29 U. S. C. §158(a)(1); that Comi's warning to Blum in mid-July 1965 violated 29 U. S. C. §158(a)(1); and that respondent's re-

fusal to recall Blum, Infranca and LiCausi was in reprisal for their engaging in protected activities and hence in violation of 29 U. S. C. §158(a)(1).

The respondent makes the usual attack upon the Trial Examiner's (and the Board's) credibility determinations. As is quite often the case, the Trial Examiner was confronted with contradictory testimony. The employees testified that management (Tolksdorf and Comi) made certain statements; management either denied having made these statements at all or claimed to have made substantially different ones. In each instance where a credibility determination was made the Trial Examiner supported his conclusion with sound reasons culled either from analysis of circumstantial factors concerning which there had been unanimity of testimony, or from documentary evidence such as employee work records. That the Examiner always credited the employee version does not detract from the plausibility of each determination where, as here, good reasons are given for adopting that version. We do not believe that the Board's approval of the Examiner's evaluation of certain testimony as reliable and other testimony as not reliable is on its face "hopelessly incredible," *NLRB* v. *Marcus Trucking Co.*, 285 F. 2d 583, 589 (2 Cir. 1961); *NLRB* v. *Dinion Coil Co.*, 201 F. 2d 484, 490 (2 Cir. 1952), and we accept this evaluation.

Respondent also contends that when Blum, LiCausi, and Infranca balked at working a split shift at straight time rates they were not engaging in concerted activity protected under 29 U. S. C. §157, and therefore Tolksdorf's comment made as the men left the meeting of June 19, 1965 cannot be a violation of 29 U. S. C. §158(a)(1). This contention is based upon respondent's view that under its agreement with the Union it was not obligated to provide

a premium rate of pay for finishers working a split shift. Indeed, it is unclear whether respondent was contractually bound to provide such a premium rate for split shift work,[1]

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[1] Since 1935 Langenbacher has maintained amicable contractual relations with the Union as representative of its hardwood finishers. Until July 31, 1964, Langenbacher executed individual collective bargaining agreements with the Union, adopting the so-called "Trade Agreement," the contract between the Union and the painting industry. On July 1, 1964 respondent joined the Manufacturing Woodworkers Association of Greater New York, Inc., and, effective August 1, 1964, began to apply the terms of the collective bargaining agreement of that Association. In June or July 1965, several hardwood finishers from the New York area, including Blum, Infranca and LiCausi from the Langenbacher shop, sought permission from the district court to sue the officers of the Union for breach of their fiduciary duties as union officers. This petition followed several incidents in which employers did not comply with the terms of the collective bargaining agreement and the Union did not act diligently enough or forcefully enough, in the eyes of these men, to protect the employees' interests. Part of the charge leveled against the union officials was that the Association agreement was a "sweetheart" agreement. Thus one of the questions to be determined by the District Court for the Southern District of New York in the aforementioned suit, now pending, is whether the Association agreement should be applied, *inter alia*, to the men in the Langenbacher shop, or whether that agreement has no vitality and the terms of the older Trade Agreement were applicable during the period of time involved here.

It appears that, under Article III of the earlier Trade Agreement, "regular time" for hardwood finishers was to be from 8:00 A.M. to 12:00 noon and from 12:30 P.M. to 3:30 P.M., Monday through Friday. Any work done outside "regular time" had to be compensated at greater than straight-time rates. Thus under the Trade Agreement the finishers clearly were entitled to a premium rate of pay if they worked on a split shift after 3:30 P.M. However, the right to a premium rate of pay for split-shift work under the Association Agreement is less clear. That agreement provides, in pertinent part:

> SECTION 6. The work week shall consist of forty (40) hours per weel [sic] divided into five (5) work days from Monday to Friday inclusive. Eight (8) hours shall constitute the working day. Double time shall be paid for all work performed outside the hours specified. Each employee shall have one hour for lunch, which may be reduced to one-half on mutual consent.

but, nevertheless, we must disagree with respondent's analysis of the situation. Even assuming, which we do not, that a union's asking for benefits plainly not accorded by the collective bargaining agreement would necessarily constitute a defense to subsequent employer misconduct, we would hold that there is substantial evidence on the whole record to support the Trial Examiner's (and the Board's) conclusion. For we have recently said that an attempt by employees to enforce their understanding of the terms of a collective bargaining agreement is a protected activity under 29 U. S. C. §157 if the employees have a reasonable basis for believing that their understanding of the terms was the understanding that had been agreed upon, *NLRB* v. *Interboro Contractors, Inc.*, 388 F. 2d 495, 500, and n. 7 (2 Cir. 1967). Here, the underlying question relative to the applicable agreement, see note 1, *supra,* is sufficient to supply a reasonable basis for the employees' belief.

Therefore, inasmuch as there is substantial evidence that the employees were engaging in protected activity at the June 19, 1965 meeting, and it being quite clear that Tolksdorf's parting shot was a threat of reprisal, we must uphold the Board's finding of a violation of 29 U. S. C. §158(a)(1) as to that incident.

The arguments made by respondent regarding the other two findings of 29 U. S. C. §158(a)(1) violations are even less meritorious. Both findings involve statements made by foreman Comi: the first statement was made to Blum alone upon his return to work after a layoff; the second to Blum, Infranca and LiCausi regarding their respective discharges. It is quite clear from the record that Comi had complete authority to determine when there were to be layoffs, who was to be laid off and who was to be re-

called to work. Thus Comi was a "supervisor" under the Act, and any admissions he might have made in carrying out these delegated duties were the respondent's admissions. See U. S. C. §152(2), (11), and, e.g., *NLRB* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 79 (2 Cir. 1953). Comi knew of Blum's long record of union activity and of his involvement in the "split shift controversy." Comi's July 4 threat to Blum therefore could reasonably be found to constitute a violation by respondent of 29 U. S. C. §158 (a)(1). See *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (2 Cir.), *cert. denied*, 375 U. S. 834 (1963). Moreover, Comi's remarks on August 18, 1965, upon the occasion of his luncheonette meeting with Blum, LiCausi, and Infranca are adequate to charge respondent with an illegal motivation for the discharges. *NLRB* v. *Ferguson*, 257 F. 2d 88 (5 Cir. 1958). This is one of those rare cases in which there has been "an outright confession of unlawful discrimination." *Id.* at 92. If Comi were merely passing along news of the job opening at Somerville he could have done so without explaining to the three men why, in this situation, they should take other employment; however, part of Comi's job was to tell employees the when and why of discharges, and, as a permanent discharge was unusual in respondent's business, in this case he had to elaborate.

Finally, respondent argues that the Board has imposed a seniority system upon respondent where none is called for by respondent's agreement with the finishers. This imposition is supposedly suggested by the Board's reliance upon the fact that other employees with less job experience than Blum, LiCausi, and Infranca were recalled while these three men were not. However, this reference to seniority used by the Board to demonstrate the discrimination in the discharges is a minor, expendable part of the

Board's analysis of all the facts in the case. The facts are that Blum, Infranca, and LiCausi were discharged on August 12, 1965 and not recalled, that all of the other employees who had been laid off, no matter what their seniority, were recalled, and that a discriminatory motive for these discharges can be found in Comi's remarks to the three men on August 18, 1965. This evidence, without any consideration of seniority, is sufficient to support a finding that the discharges were improperly motivated and were in violation of 29 U. S. C. §158(a)(1). *NLRB* v. *Ferguson, supra.*

The petition for enforcement is granted.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 31,455

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JOHN LANGENBACHER CO., INC.,

Respondent.

Before: Waterman, Moore and Friendly, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by against the Respondent, John

Judgment

Langenbacher Co., Inc., its officers, agents, successors, and assigns on October 21, 1966. The Court heard argument of respective counsel on December 5, 1967 and has considered the briefs and transcript of record filed in this cause. On July 17, 1968, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that John Langenbacher Co., Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

STERRY R. WATERMAN
Judge, United States Court of Appeals
for the Second Circuit

LEONARD P. MOORE
Judge, United States Court of Appeals
for the Second Circuit

Filed: August 22, 1968

A true copy,
A. DANIEL FUSARO
Clerk

APPENDIX B

Decision and Order

On July 1, 1966, Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that those allegations be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, John

Langenbacher Co., Inc., New York, N. Y., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., October 21, 1966.

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINGS, JR., *Member,*
(SEAL) NATIONAL LABOR RELATIONS BOARD.

Trial Examiner's Decision

STATEMENT OF THE CASE

Upon a charge filed on October 18, 1965, by Carl Blum, an individual, the Complaint herein issued on December 30, 1965, alleging that John Langenbacher Co., Inc. (herein called Langenbacher, the Respondent or the Company), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), by refusing to reemploy after a layoff occasioned by economic considerations employees Carl Blum, Joseph LiCausi and Frank Infranca because they had engaged in several acts of protected concerted activity. The complaint alleged as well two instances of threats or warnings of reprisal to the employees because of their concerted activity. At the hearing, General Counsel amended the complaint to allege a third instance of protected activity and a warning by Respondent to the employees to cease such involvement. The Respondent's defense, in substance, is a denial that the failure to recall the three employees was in reprisal for

their concerted activity and a denial of any threats or warnings arising from the employees' actions. Further, Respondent asserts that in the absence of any provision in the collective bargaining agreement providing for job security or requiring that layoff and recall from layoff be governed by seniority, the Charging Party and his fellows are attempting to achieve such job protection by means of this proceeding.

All parties participated at the hearing conducted by Arthur M. Goldberg, the duly designated Trial Examiner, at New York, New York, on March 7 through 11 and April 14, 1966, and were afforded full opportunity to be heard, introduce evidence, to examine and cross examine witnesses, to present oral argument and to file briefs. Oral argument was presented and briefs were filed by General Counsel and Respondent. Motions made by Respondent at the close of General Counsel's case to dismiss the complaint in whole or part, on which I reserved ruling until issuance of this Decision, are disposed of in accordance with my findings below.[1]

Upon the entire record in the case, my reading of the briefs, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, the answer did not controvert, and I find that John Langenbacher Co., Inc. is and has been

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[1] General Counsel's Motion of May 18, 1966, to correct errors in the transcript of the proceedings, standing unopposed, is hereby granted.

at all times material herein a New York corporation, with its principal place of business in the County of the Bronx, city and State of New York, where it is engaged in the manufacture, sale and distribution of architectural woodwork and related products, and is an employer engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

District Council No. 9, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (herein called District Council No. 9 or the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

Langenbacher is part of the architectural woodwork industry, constructing and installing the wood interiors of banks, hotels, restaurants, offices and the like. As in other phases of the construction industry, all of Langenbacher's work is performed on a contract basis, with no inventory accumulation.

The wood finishing division of Langenbacher's operation involved in this proceeding, employs only some 8 or 10 of the Company's over 100 employees. The wood finishers, members of the Union, are part of a group of only about 125 such craftsmen available to the industry in the city of New York. The work is skilled, requiring a 4-year apprenticeship before journeyman status is achieved. Other wood finishers represented by the Carpenters Union, are not involved in this proceeding.

Prior to 1962, the jurisdiction of District Council No. 9 did not include Brooklyn or Queens. As a result, over the

years a substantial differential developed in the wages of wood finishers employed in the Bronx and Manhattan and those working at the trade in Brooklyn and Queens. After 1962, District Council No. 9's jurisdiction was expanded to take in Brooklyn and Queens, and thereafter in the July 1, 1964 collective bargaining agreement between the Union and the Manufacturing Woodworkers Association of Greater New York, Inc. (herein called the Association) a program was established to narrow the wage differential over a 3-year period. By granting increases to the Brooklyn-Queens men every 6 months during the 3-year term of the contract, while giving only two increments to the Bronx-Manhattan employees during the same period, the wage gap between the two groups was to be cut from 46 to 20 cents at the contract's end.

Langenbacher has since 1935 maintained contractual relations with District Council No. 9 as the representative of its wood finishers. Until July 31, 1964, the Company executed individual collective-bargaining agreements with the Union, adopting the so-called Trade Agreement, which is the contract between the Union and the painting industry. On July 1, 1964, Langenbacher joined the Association and effective the following August 1 began to apply the terms of the Association collective-bargaining agreement.[2]

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[2] There is presently pending in the Federal District Court, Southern District of New York, a lawsuit, *infra*, which raises *inter alia* the question as to which of the two contracts, *i.e.*, the Association or the Trade Agreement, should apply to the employees of several employers, including Respondent. At issue as well is the good faith of the parties in entering into the program to ease the wage differential described above. Accordingly, I shall make no findings on these two issues. Moreover, I need not resolve these points to determine the questions presented to me by the instant complaint.

Trial Examiner's Decision

The last Trade Agreement adopted by Respondent, provided a wage scale of $4.50 per hour for "New Work" and $4.06 per hour for "Repaint Work" [3] for the period August 1, 1962 to July 31, 1964. It appears that while the practice was to pay wood finishers at the Repaint scale, Respondent in this instance raised its finishers to $4.50 per hour. Subsequently, upon learning of its error in the Spring of 1963, Kurt Tolksdorf, Respondent's president, called the employees together and informed them that the rate would be reduced to $4.06. Tolksdorf suggested that the finishers see Martin Rarback, Secretary-Treasurer of District Council No. 9. The men met with Rarback and as a result took the wage cut instituted by the Company. At this meeting, Rarback selected Anthony Liggio, a long-time employee of Respondent, to act as shop steward and so advised the Company. About 1 week thereafter Tolksdorf called the finishers together again and told the men to call the Union to find out about institution of an 8 hour rather than the 7 hour day they then were working. Liggio and Joseph LiCausi spoke to Morris Arber, Assistant Secretary-Treasurer of District Council No. 9 who said the 8 hour day was proper. They so advised Tolksdorf and thereafter worked an 8 hour day.

In the Summer of 1964, District Council No. 9 announced in its newspaper the negotiation of a new collective-bargaining agreement providing wage increases for the entire membership. LiCausi asked both Frank Comi, foreman of the wood finishing section and Eric Falso, company office manager, about the raise. He was informed that the Company had not as yet received a new contract

[3] Both terms, New Work and Repaint Work, appear to be words of art peculiar to the painting industry. The record does not indicate that either term had any significance to the wood finishing trade.

from the Union but that the raise would be retroactive to August 1. It appears that at that time Rarback was away from his office at a convention. At the same time, Carl Blum, the charging party herein, had learned that the wood finishers employed by Jacob Froehlich Cabinet Works, a competitor of Respondent, had not received their raise. After LiCausi reported his findings, Blum organized a committee of two employees from the Froehlich shop and two from Respondent to meet with and tell Rarback they had not received the announced raise. Though Blum set up the committee and arranged for it to meet with Rarback, he himself did not go with the delegation. As Rarback at this meeting said would happen, the finishers subsequently received an increase of 10 cents per hour, retroactive to August 1, bringing their hourly rate to $4.16.[4]

Each year the employees receive from the Painting Industry Insurance Fund a statement showing, among other things, the total wages on which their employer made a stated percentage contribution to the Fund. A number of Respondent's finishers noticed that the wages reported on their 1964 statement from the Fund, received in April 1965, were lower than their earnings reported for income tax purposes on the W2 forms supplied by the Company. In LiCausi's case the discrepancy was approximately $2,000. Froehlich's finishers reported the same problem. On receiving his statement Blum pointed out the disparity in the figures to Foreman Comi. When Comi asked what difference it made to Blum, the latter explained it affected

[4] The July 1, 1964 agreement between the Association and the Union provided for a $4.16 per hour rate for Bronx-Manhattan finishers. As noted, effective August 1, 1964, Respondent applied the terms of the Association agreement to its finishers.

his vacation pay and the amount paid as a percentage contribution by Respondent for welfare purposes. Comi replied that the finishers made enough money and he could not understand why they fussed about little things. Once again Blum formed a committee of Langenbacher and Froehlich finishers, this time himself serving as a member. The committee visited the Insurance Fund's office where they learned Respondent was making its percentage contributions on straight time earnings for both regular and overtime hours, with no contribution made on premium, bonus or any overscale portion of wages. The foregoing method of computation was proper under the Association agreement, but not under the Trade Agreement which called for contributions to be made on gross wages. LiCausi discussed the Company's method of contribution with Falso, its office manager, who confirmed that contributions were not being made on premium time.

Following this visit to the Insurance Fund, Blum, using his own mailing list of wood finishers, sent out some 70 to 80 cards to finishers in the city inviting them to a meeting. At this meeting, held in mid-April 1965, the Hardwood Finishers Club (herein called the Club) was organized. As explained by Blum, the purpose of the Club was "to protect our Bronx and Manhattan woodwork finishers from being relegated to an inferior contract like the Queens and Brooklyn men were working under. We wanted to continue to keep together for our mutual protection." Frank Schonfeld, a painter, Blum, and Louis Candela, a finisher then employed by Froehlich and now working for Langenbacher, were elected officers of the club. Though it had no dues, the club met fairly regularly with expenses covered by contributions from the members.

Trial Examiner's Decision

On June 29, 1965, seven members of the Club, including Blum and Frank Infranca, met with Morris Arber at the Union's office to complain of Respondent's method of contribution to the Insurance Fund. When no remedial action satisfactory to them was undertaken by the Union, Blum, Infranca, LiCausi and 17 other finishers and Schonfeld, the painter, petitioned the court for permission to sue Rarback and Arber for alleged breach of their fiduciary duties as Union officers.

B. *The split shift incident*

In June of 1965 Langenbacher was working on a contract for the interiors of over 30 branches of the Chase Manhattan Bank. Because of delays in construction, Respondent's end of the job could not be installed at the job sites and as a result the finished material piled up at the plant, the finishing room being used for storage after Respondent's warehouse and truck dock had been filled. It thus became difficult for a full shift of finishers to properly function in the crowded quarters.

On Saturday, June 19, 1965, Foreman Comi called the finishers together and after telling them that the Company had a number of jobs which had been contracted on the assumption of no overtime costs, asked the men to work a split shift, with half the force working from 8 a. m. to 4:30 p. m. and the other half reporting at 12:30 p. m. and working until 9 at night. After an exchange between Blum and Comi about the proper rate of pay for such an arrangement and the necessity of obtaining Union approval, Comi said, "We are not all pure. We don't always do whatever the Union says." The men refused to go along with Comi's suggestion, and after he called Tolksdorf, all went up to the latter's office for further discussion of the proposed work schedule change.

Tolksdorf greeted the five finishers who came to his office by asking what their beef was. He went on to say they were doing wrong by Comi and pointed out that their earnings had been high. Tolksdorf then turned to Frank Infranca and saying he understood Infranca had a big mouth, suggested he serve as spokesman. Tolksdorf explained that Rarback had called after a meeting the men had had with the union official and told the company president of Infranca's "big mouth." Referring to the finishers previous Jewish foreman, Tolksdorf said to them, four of whom were Italian, that he could have loaded the plant with Jews, attaching to the reference an obscene appellative, but that instead he had made one of their own kind the foreman, namely Frank Comi. At this point Blum, after noting his opinion of Tolksdorf's remark, left the meeting.

Thereafter, Tolksdorf pointed out that John Imbasciani and Liggio had worked for Langenbacher for many years and that he had taken Infranca and LiCausi off the streets. He stated his feeling that the men could repay him by working the split shift at straight time pay. After discussion as to how the second shift would continue and under what conditions Respondent would again ask the men to work under such an arrangement, the finishers refused to go along with the change in working hours. At this point the men left. Infranca alone testified that as they left the office, Tolksdorf said, again using fecund shop language, that what the men had done unto him this time, he would do unto them the next. Infranca explained that he alone heard this remark because he was the last employee to leave the office. Tolksdorf denied making the statement. The Chase Manhattan contract was subsequently cancelled at a loss to Respondent and the finished material moved out to a competitor's plant.

General Counsel alleges that the employees were engaged in protected concerted activity during the course of their joint refusal to work the split shift. I so find. *Interboro Contractors, Inc.*, 157 NLRB No. 110.

Further, it is alleged that Tolksdorf's parting shot to Infranca as the men left the office was a threat of reprisal for the finishers having engaged in the protected concerted activity found and violated Section 8(a)(1) of the Act. I so find. *The Youngstown Cartage Company*, 146 NLRB 305. In so finding I necessarily credit Infranca's testimony that the statement was made and discredit Tolksdorf's denial. Imbasciani, the only witness to the meeting who was not directly involved in the outcome of this proceeding, substantially corroborated Infranca's account of the meeting in all respects other than Tolfsdorf's threat, an omission explained by his having left the office before Infranca and so having been beyond earshot when the words were spoken. In choosing between Infranca and Tolksdorf, I rely upon Imbasciani's support of Infranca, as well as my observation of the witnesses' demeanor while testifying and Tolksdorf's general lack of candor.

C. *The Anthony Comi incident*

Foreman Frank Comi's college student son Anthony worked in Respondent's finishing department during vacations from his studies. Prior to the summer of 1965 Anthony was not a member of the Union. In June of that year, Anthony again came to work in the factory.

This time Anthony's presence in the finishing department caused unrest. John Kohnken, the apprentice, complained to all who would listen that he was doing menial, manual tasks while Anthony was working as a journey-

man. Others were concerned that the finishers in the Langenbacher shop would be exposed to accusations of disloyalty to District Council No. 9 if they worked with Anthony, then not a member of the Union.

During the morning of June 30, Shop Steward Liggio approached Frank Comi and told the foreman of the finishers' concern about Anthony's nonunion status. Frank Comi became upset and stormed from worker to worker, asking if each had any objections to his son working in the shop.

Blum sought to explain to the foreman that the men had been holding meetings and had gone to the District Council about their grievances, among which were complaints about nonunion men working in union shops. Comi replied that he had heard of these meetings through the grapevine and went from Blum to another worker.

Thereafter, Comi took the problem to Tolksdorf who advised him to send Anthony to the Union to obtain an apprentice card. That very afternoon Anthony went to District Council No. 9, where he paid 3 months dues in advance and obtained a working card. Nothing more was heard of the matter until General Counsel at the opening of the hearing herein moved to amend the complaint to allege that the employees were engaged in protected concerted activity when complaining of Anthony's employment. General Counsel further alleges that Frank Comi's angry investigation of Liggio's report of the men's concern constituted a warning to the employees to refrain from such concerted activity.

I shall recommend that this allegation of the complaint be dismissed. In so doing I do not dispute that the employ-

ees, however wrong in their grievance,[5] were engaged in protected concerted activity in pressing their complaint. *Interboro Contractors, Inc.*, 157 NLRB No. 110, footnote 7 and cases cited therein. However, I do not find that Frank Comi warned the employees to refrain from their concerted activity. No direct evidence was offered of such a warning. If one be found, it must be inferred from Comi's manner of investigating the depth of employee oppcsition to his son's employment. This I cannot do. While Comi's anger at the finishers' complaint would under ordinary circumstances have exceeded a normally expected reaction, even then I would read no warning into his conduct. Moreover, I am mindful that this protest was directed against his son and would therefore elicit a stronger response. See *Thor Power Tool Company*, 148 NLRB 1379.

D. *Comi warns Blum to cease his union activities*

Carl Blum was laid off by Comi on July 2 or 3, 1965, with orders to call his foreman during the course of the following week to learn when to report back to work. Pursuant to these directions Blum telephoned Comi at Respondent's plant for instructions. During this conversation Comi reiterated a previous warning to Blum, that should he be further involved in union activities and "these people upstairs" at Langenbacher hear about it, they would drop him from their employ immediately and Comi would be powerless to help. Further, Comi expressed surprise that Blum had not learned a lesson from his previous activities. Blum, whose version of the conversation

[5] Though Anthony had not joined the Union by June 30, he had not as of that date been employed 30 days, and was therefore free, under the statute and the contract, to work without union sanction.

I credit over Comi's denial that he had uttered the threat, explained that Comi's last remark referred to Blum having usually been on every committee formed that had anything to do with employee benefits.

Company records, which establish that Blum did not work during the week ending July 11, 1965, support his recollection of the conversation. Blum testified that he had called Comi during the week while on layoff status. Comi, on the other hand, stated that while he had originally told Blum "to take a few days off," he suddenly discovered need for Blum's services and over the weekend called him back to work. Thus, Comi recalled that Blum had not been on layoff during the period in question. The entire conversation, Comi stated, consisted of his telling Blum to forget the layoff and report for work on Monday. Since Blum was on layoff for the week, Comi's account of the conversation is erroneous.

I find Comi's warning that Blum's services would be terminated by Respondent if top management learned of his involvement in activities protected by the Act, violated Section 8(a)(1).

E. *The lawsuit*

Following the failure of union officials to take action satisfactory to them to rectify what they conceived to be improper contributions to industry welfare funds by certain employers, including Respondent, 20 finishers and 1 painter took the matter to court. On July 15, 1965, this group acting "on behalf of and for the benefit of District Council No. 9" filed a petition pursuant to Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, for leave to commence an action against Rarback and Arber for alleged breach of the fiduciary duties imposed by Section 501(a) of that statute.

Among the named plaintiffs were the alleged discriminatees, Blum, Infranca, and LiCausi. Joining with them were three other Langenbacher employees, Liggio, Imbasciani and Bernard Brady. Additional plaintiffs were John Pawlizyn and Louis Candela who were hired by Langenbacher after the events herein.

In sum, the events and transactions set forth in Section A, *supra,* entitled Background, constitute the alleged violations of fiduciary duties by the Union's officials. The Association agreement with its program for equalizing finisher's wages throughout the city of New York is alleged to be a "sweetheart" agreement. In the various affidavits filed in support of the petition for leave to sue, the grievances of Langenbacher's finishers against their employer are prominently expounded.

This initial petition for leave to sue was denied but a second petition filed on July 28, 1965, was granted on August 23.

On September 29, Tolksdorf gave an affidavit in support of a motion for summary judgment filed by the defendants, Rarback and Arber.

General Counsel urges that the employees were engaged in protected concerted activity when participating as plaintiffs in this action against their Union's officials. I so find.

F. *The layoffs*

On August 12, 1965, Respondent laid off Blum and LiCausi, together with Kohnken the apprentice, Gruenstrass who had been hired on July 13 and Lucia, so new to the industry that he was not yet a member of the Union although experienced in wood finishing from his prior employment in furniture manufacturing. The following Mon-

day, Infranca, who was not at work on August 12, was furloughed.

It is conceded that the layoff was economically motivated, occasioned by the type of work coming through the shop at that time which did not require finishing in the shop, but was instead painted at the construction site after installation. However, General Counsel alleges that Respondent took advantage of this layoff to rid itself of the named alleged discriminatees by not recalling them to employment.

Kohnken, Gruenstrass and Lucia were recalled to work within a reasonable period of time after the layoff. Much evidence was adduced about industry practice pertaining to recalls after layoff. Additionally, proof was offered on the identity and comparative skills of new employees hired by Respondent at the very time it was ignoring requests by the three discriminatees to be put back to work.

In finding that Langenbacher violated Section 8(a) (1) by its refusal to recall the three employees from layoff status I do not deem it necessary for me to decide whether, in the absence of any such contract provision, wood finishers by industry custom and practice have seniority and recall rights. Nor do I see the need for me to rule whether a wood finisher trained in Germany 40 years ago is a more valuable employee than one who had worked 11 years without break for Respondent.[6]

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[6] In reaching my ultimate conclusions herein I am not unmindful of the fact Infranca was primarily skilled as a sprayer and Pawlizyn, who was employed after the August 12 layoff, is also valuable principally for his spraying ability. I note as well that LiCausi was rated as a good all around finisher as were most of the new hires after the layoff in question. Finally, while Blum was utilized mostly as a rubber (one who buffs a finished surface), in the face of Respondent continuing unchanged its pre-layoff operation, I must assume that his skill as well was needed in the production process.

Rather, I base my findings on Comi's admissions made while offering the three finishers employment at a competitor's shop and the very act of seeking to place them in that employment, conduct I find to be out of character with usual behavior.

G. *The luncheonette incident*

Shortly after the August 12 layoff, Fred Correale, finishing foreman for William Somerville, Inc. (herein called Somerville) requested that Comi refer some finishers to him. A day or two later Comi returned the call, told Correale he had three men available and asked how much work there was for them. Correale estimated there were at least 5 weeks of work on hand, probably more. Comi said he would talk to the men and see if they would accept Correale's offer. When Correale asked that good men be sent, Comi allayed his concern by naming LiCausi, Infranca and Blum as the men he had in mind. Correale had worked with Infranca and LiCausi when he had been employed by Langenbacher some years before and knew them to be qualified. When Correale asked why Comi was sending these three men, inquiring if work was slow at Langenbacher, Comi put him off, saying he would discuss this with Correale later.

Comi called the three men together for a meeting on Wednesday, August 18, 1965, at a luncheonette located on the same street as Respondent's plant. The four men assembled some minutes after 10 a. m. After Comi announced that work was available for them at another plant, Blum asked if this meant the layoff was permanent. Comi replied that he could not give an answer. The men would have to read between the lines, he said, and if they returned to the plant looking for work, saw new faces and available work, but Comi would not hire them, they would know the

answer to the question. Comi stated the decision to lay them off was not his and that he was merely following orders. Comi then pointed out to Blum that he had warned him of the consequences of continued union activity, but understood that it was in Blum's nature to be so involved. Turning to Infranca and Li Causi, Comi expressed surprise and disappointment at their activity. Noting that they had had good jobs, Comi said they had no business getting involved in union activity. To Infranca and LiCausi, Comi raised the possibility that if they "kept their noses clean" and came back after several months and apologized to Tolksdorf, they could again work for Langenbacher. Comi then asked them to think over the job offer (the men knew that the shop involved was Somerville) and to give him an answer when he returned to the luncheonette in a few minutes. Infranca and LiCausi accepted the jobs at Somerville, but Blum agreed with Correale that it would be best for him not to start on a new job as he was scheduled for surgery on his hand. In fact, Blum entered the hospital on September 8 and was unavailable for work until after October 6.

LiCausi and Infranca started working for Somerville on Monday, August 23. On Licausi's recommendation, Correale hired John Kohnken, Langenbacher's apprentice who had also been laid off on August 12. Kohnken started work on Tuesday morning, at which time Correale assured him of a long period of employment at Somerville. However, on Thursday, Kohnken informed Correale that Comi had called and said he wanted Kohnken to return to Langenbacher. Kohnken finished out the week at Somerville and then returned to Respondent's employ. While working for Somerville, Kohnken received journeyman contract scale wages.

Comi's version of the luncheonette meeting itself substantially conforms to that of the three discriminatees, except that he denies any reference to union activities or that work might be available in the future for Infranca and LiCausi if they apologized to Tolksdorf. Comi remembers questions concerning the duration of the layoff to which he recalls replying that he could not say. Comi's recollection of the date and time of the meeting conflicts with that of Correale and the discriminatees.

I credit the employees' testimony attributing to Comi the statements squarely establishing Respondent's unlawful reasons for failure to recall them to work. If it was Comi's purpose to serve only as a conduit for Correale's job offer there was no need for him to call the men together. Comi could have transmitted the message by telephone or could simply have given the employees' telephone numbers to Correale. In part, I conclude that Comi wished to justify his actions to the employees and to exculpate himself from blame for their loss of employment. However, I find controlling, the need to explain to them why in this particular layoff situation they should take other employment. LiCausi had worked for Langenbacher for 11 years; Infranca for 6; and, Blum had been in the plant finishing unit since December 1963. During their respective periods of employment, each had been laid off a number of times. However, on every occasion in the past, recall to work had shortly followed. Based on their years of experience with Respondent's layoff and recall procedure, no reason existed for the employees to believe that this furlough was in fact a discharge. Accordingly, absent direct information that they could expect no further work from Langenbacher, Comi could not have reasonably expected that the three finishers would accept Correale's

offer. Thus, Comi's explanation that he merely advised the men of Correale's offer lacks credibility. Moreover, Comi's account of what was said in his meeting with the men is questioned by his inaccurate recall of the time and date of the encounter.

Accordingly, I conclude and find that Respondent's failure to recall to work Infranca, LiCausi and Blum, in spite of a letter they wrote requesting reemployment, telephone calls and visits to the plant for the same purpose, was in reprisal for their concerted activity, and a violation of Section 8(a)(1).[7] In so finding, I have considered the various defenses raised by Respondent; that there was no obligation to recall the laid off employees; that when work was available better applicants were at the door; and, that it was against the rules of the game to call Infranca and LiCausi away from their employment at Somerville. I would find the violation here even if I did not reject these defenses as being without merit, which I do, noting that the employees had always been recalled before, that no challenge was made to their complete ability to handle their job assignments, and that Comi had no compunctions about calling Kohnken away from Somerville. In view of my crediting the testimony establishing Comi's admissions, and my findings above of prior warnings of retribution to come for concerted activities, I find the true reason for the refusal to reemploy Blum, LiCausi and Infranca was their protected concerted activities.

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[7] In view of the fact that the remedy would be the same, I find it unnecessary to determine whether the failure to recall to work also violated Section 8(a)(3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent's refusal to recall Blum, LiCausi and Infranca from layoff violated Section 8(a)(1) of the Act. My recommended order shall provide for their reinstatement and that they be made whole for any loss of earnings resulting from the discrimination, their backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, with interest thereto in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. John Langenbacher Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The evidence adduced herein establishes that Respondent threatened employees with reprisals for their having engaged in protected concerted activities and refused to recall Carl Blum, Joseph LiCausi and Frank Infranca to its employ after an economic layoff in August 1965, in violation of Section 8(a)(1) of the Act.

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

The Respondent, John Langenbacher Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals for engaging in protected concerted activities or warning employees to refrain from union activities.

(b) Refusing to recall employees from layoff or otherwise discriminating in regard to their hire, tenure of employment, or any other term or condition of employment, because they have engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section

8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Carl Blum, Joseph LiCausi and Frank Infranca immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any rights or privileges they may have enjoyed, and make each of them whole for any loss he may have suffered by reason of the failure to recall him to employment in the manner and to the extent set forth in the section entitled "The remedy."

(b) Notify the above-named employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary or useful to determine the amount of backpay due.

(d) Post at its Bronx, New York, New York, plant copies of the attached notice marked Appendix A.[8] Copies

[8] In the event that these Recommendations shall be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DEREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Second Region in writing within 20 days from the receipt of this Decision and Recommended Order what steps it has taken to comply therewith.[9]

It is further ordered that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

Dated at Washington, D. C., July 1, 1966.

ARTHUR M. GOLDBERG,
Trial Examiner.

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[9] In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Second Region, in writing, within 10 days from the date of the receipt of this Order what steps Respondent has taken to comply herewith."

APPENDIX C

Relevant Provisions of the National Labor Relations Act

Section 7. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 758

JOHN LANGENBACHER CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On facts adequately summarized in the court of appeals' opinion (398 F. 2d 459; Pet. App. 15-23), the National Labor Relations Board found that the Company had threatened three employees with reprisal for their refusal to agree to work for ordinary hourly wages at times when they believed themselves entitled to premium rates, and then refused to recall these employes from a layoff as a reprisal for that action and

certain earlier concerted activity. It found that this behavior violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and ordered that the Company cease and desist from this conduct for the future, offer reinstatement to the three employees, and make them whole for any losses they had suffered as a result of its unlawful conduct. The court of appeals found the Board's decision and order "supported by substantial evidence" and accordingly granted the Board's petition for enforcement.

Petitioner now contends, for the first time, that the employees' refusal to agree to the suggested working arrangement was a breach of the no-strike clause of the collective bargaining agreement. But there was never a work stoppage; the Company never ordered the employees to work under the suggested arrangement, but dropped the matter when they declined to agree to it and returned them to their regular work (Pet. 4). Moreover, even assuming such a breach, the Board found, with court approval, that the reason the Company refused to recall the employees from their layoff was not a desire to discipline them for illegal conduct, but a wish to punish them for the concerted activity for mutual aid and protection in which they engaged and of which it generally disapproved. An employer so motivated violates Section 8(a)(1) of the Act. In essence, petitioner seeks to have this Court undertake its own review of the facts; the petition thus presents no issue warranting further review by this Court.

It is therefore respectfully submitted that the p
tion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JANUARY 1969.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 758

NATIONAL LABOR RELATIONS BOARD,

against

JOHN LANGENBACHER CO., INC.,

Petitioner.

PETITIONER'S REQUEST FOR REHEARING

MILLER AND BUSH,

By: ALGERNON M. MILLER,
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405 Lexington Avenue,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 758

NATIONAL LABOR RELATIONS BOARD,

against

JOHN LANGENBACHER CO., INC.,

Petitioner.

PETITIONER'S REQUEST FOR REHEARING

Petitioner requests a rehearing of its application for a writ of certiorari. The basis for this request is that petitioner believes that a serious threat exists to the rights of an employer to operate its business under the decisions of the National Labor Relations Board and the Circuit Courts of Appeals and the decision of this Court.

The facts will be repeated here even though repetitious. Petitioner was found to have violated Sections 8 (a) (1) of the Labor Management Relations Act, as amended, by having failed to rehire three employees who were laid off with others because of economic conditions because these three employees had prior to their lay-off participated in concerted activity. The concerted activity consisted of the following: Petitioner's president requested approximately six of the employees of its finishing department to come to his office and told them to work a staggered starting time so that half of the employees would come to work at 8:00 A. M. and the other half at 12:30 Noon. One of the employees left before the meeting finished. The other

employees refused to work as requested, unless they were paid premium pay. There were a total of eight employees in the finishing department. These employees were covered by an existing collective bargaining agreement with District Council No. 9 of the Painters Union. The collective bargaining agreement did not restrict petitioner's right to fix starting time, nor did it provide for premium pay except in the case of more than eight hours of work in a day or forty hours of work in a week, neither of which was involved. It was necessary to stagger employees' starting times because the area occupied by the finishing department was being used as a temporary store room caused by a delay in being able to deliver finished material and it was impossible for all the employees to work there efficiently at the same time. No disciplinary action was taken at the time against the employees who refused to work the staggered starting times. About two months later, the employment of approximately six of the employees of the finishing department was terminated because of lack of work. When petitioner got busy again three of these employees were not recalled to work. The Board found, and for the sake of argument petitioner agrees, that these three employees were not recalled because two months before they had refused to work staggered starting times unless they received premium pay.

No charge has ever been made that any anti-union *animus* provoked the petitioner in this case. In *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245, 255-258, this Court held that the right of employees to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection guaranteed by Section 7 (a) of the National Labor Relations Act has not "irrevocably labeled all concerted activities protected" (p. 257). In this case the Court found that repetitious

work stoppages of short duration did not constitute protected activity.

In *Honolulu Rapid Transit Company Limited*, 110 N. L. R. B. 1806, the employees refused to work weekends but continued to work during the week. In holding this was not protected activity, the Board said "Establishment of work schedules is a responsibility (prerogative) of the employer which may of course, be the subject of bargaining. Employees may not, however, simultaneously accept and reject them, and thereby in effect establish and impose upon the employer their own chosen conditions of employment" (pp. 1809-1810). Both the Board in the *Honolulu Transit* case, *supra*, and this Court in *Auto Workers* v. *Wisconsin Board*, *supra*, cited with approval, *C. Q. Conn. Ltd.* v. *N. L. R. B.*, 108 Fed. 390 (CA 7), where employees refused to work overtime.

In *John S. Swift Company, Inc.*, 124 N. L. R. B. 394, the employees, to implement their demand that the employer cover them under the Union's health and welfare plan, refused to work over-time. In holding this action not protected concerted activity the Board said (p. 397):

> "The employees refusal to work over-time on March 11 constituted an attempt to work on terms prescribed solely by themselves. The Board and the Courts have squarely held that such refusal to work provides the employer with valid ground for discharge."

Under the decisions of this Court and the Board the employees in this case were seeking to impose upon petitioner their own terms of employment, and petitioner could have discharged any employee who refused to work a staggered starting schedule. The refusal to work a staggered starting schedule was not protected concerted

activity. For reasons which to petitioner were sufficient, it did not choose to exercise its right to discharge at that time. It is illogical to hold that concerted activity which is unprotected at the time it occurred becomes protected by the mere passage of time. The finding of the Board that the refusal to work staggered starting times constituted protected concerted activity under Section 7 of the Act is contrary to the decisions of the Board, to the decision of the Circuit Courts of Appeals and to the decision of this Court.

Petitioner's request for certiorari should be granted.

Respectfully submitted,

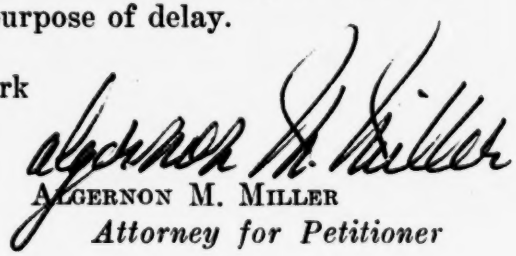
MILLER AND BUSH,

By: ALGERNON M. MILLER,
Attorneys for Petitioner.

February 13, 1969.

I CERTIFY that this application for rehearing is made in good faith and not for the purpose of delay.

Dated: New York, New York
February 13, 1969.



ALGERNON M. MILLER
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